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House Subcommittee on Courts, the Internet and Intellectual Property
Section 115 of the Copyright Act
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Mr. Chairman, Mr. Berman, and Members of the Subcommittee, thank you for this opportunity to testify on behalf of the National Music Publishers' Association (NMPA) on the "Mechanical Compulsory License" under section 115 of the Copyright Act. NMPA is the principal trade association representing the interests of music publishers in the United States. The more than 800 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For more than eighty years, NMPA has served as the leading voice of the American music publishing industry – from large corporations to small businesses -- before Congress and in the courts.

The Harry Fox Agency ("HFA") is the licensing affiliate of the NMPA. It provides an information source, clearinghouse and monitoring service for licensing musical copyrights, and acts as licensing agent for more than 27,000 music publisher principals, which in turn represent the interests of more than 160,000 songwriters

Background.

Enacted in 1909, the Mechanical License is the oldest statutory license in copyright law. This statutory mechanism allows commercial users of nondramatic musical works to invoke the compulsory license and reproduce and distribute such works at a royalty rate set by the statute, as long as the terms and conditions of section 115 are

followed. The 1909 Act set the statutory rate at 2 cents per song, and this rate did not change for ***69 years***, when Congress added a rate-adjustment mechanism for the statutory rate. Since that time, the statutory rate has increased – usually by industry negotiation -- and today stands at 8.5 cents per song. If the mechanical right statutory rate had increased commensurate with the Consumer Price Index, the rate today would be 37 cents per song. At 8.5 cents, the current "mechanical rate" thus represents a substantial bargain as compared to the rate set by Congress in 1909.

While the 8.5 cents statutory rate acts as a ceiling, it does ***not*** act as a floor. Music copyright owners are free to negotiate lower rates with users of copyrighted musical works, and often do. In some instances, contractual provisions such as "controlled composition clauses" in the recording contracts of certain artists require the composers of musical works to accept 75% or less of the statutory rate. As a result, the average actual rate paid for musical works is significantly less than 8.5 cents per song.

The most significant recent amendment of section 115 occurred in 1995, when the Digital Performance Right in Sound Recordings Act confirmed that the reproduction and distribution rights of music copyright owners are implicated – and the statutory compulsory license is available -- when a phonorecord is transmitted electronically by a "digital phonorecord delivery" ("DPD"). Unfortunately, while Congress and the music industry assumed in 1995 that the Internet would provide an exciting new medium for the distribution of music, the environment turned sour in 1999 with the launch of the Napster service. Since then, unfortunately, piracy has dominated Internet distribution of music. No royalties from these "peer-to-peer" transmissions of copyrighted musical works are

received by authors, songwriters, and music publishers. Since 1999, when Napster was launched, music publishers have seen their mechanical royalties plummet by 22 percent.

Although unauthorized P2P services continue to dominate Internet delivery of music, the recent launch of Apple's iTunes service – and other paid download services – has finally begun to fulfill the promise that the Internet offered as a legitimate marketplace for music. NMPA and its members are excited about these new services and strongly support their efforts.

It should be emphasized that our members have every economic incentive to issue as many licenses to new, legitimate Internet music services as possible. It is only through license agreements that our members are compensated. As of today, NMPA has issued over 1.75 million licenses for musical works to 39 different companies offering digital musical services. These licenses represent the vast majority of musical works for which there is any meaningful level of consumer demand.

Pursuant to the 1995 Act, NMPA and RIAA negotiated an agreement in 1997 whereby "digital" rates and terms for "downloads" of musical works would mirror the rates for "physical phonorecords" sold between January 1, 1998 and December 31, 2007. In the Fall of 2001, NMPA, HFA and RIAA negotiated a second agreement, under which the two sides agreed that: (1) compulsory licenses under section 115 would be made available to subscription services offering "limited downloads" and "on-demand streams" of musical works, and (2) the subscription services could launch their businesses at the time of the agreement and pay royalties in the future when royalty rates for such

transmissions were set. HFA has entered into similar subscription licensing arrangements with Full Audio, Listen.com the new Napster.

CARP Reform Bill

Mr. Chairman and Mr. Berman, we thank you for your help in drafting and advancing the "CARP Reform" bill to passage in the House. There are many changes in this legislation that are helpful to music publishers, through both a reform of the general "arbitration" style of rate-setting and distribution of royalties and various technical amendments to section 115.

Present Evaluation of Section 115

In the view of NMPA, no additional legislative changes to section 115 are necessary at this time. The basic principles of the section 115 compulsory license remain reasonable and appropriate, even in the digital era. In exchange for the guaranteed right of music users to reproduce and distribute nondramatic musical works, music copyright owners are guaranteed a return on their works (currently 8.5 cents per song, or up to $1.04 for a 12-song album that typically retails for $15). A rate-adjustment mechanism promotes voluntary agreements among music copyright owners and those who would use their works commercially, while affording "the copyright owner a fair return for his creative work" pursuant to the various factors under section 801(b)(1)). These principles make as much sense in the digital era as they did in the physical phonorecord era.

The recent success of iTunes confirms that current law is not an impediment to consumer demand for digital delivery of music when a commercially viable product is

made available. In the last few years, this committee has heard from critics of section 115 that the unwieldy music publisher community impedes the mass licensing of music, and thus the electronic availability of wide ranges of music. These critics have suggested that amendments to section 115 would facilitate cheaper and faster access to musical works, and thus greater public acceptance of lawful sources of digitally-transmitted music. The recent success of iTunes shows, however, that the critics of section 115 should have spent less time lobbying Congress and more time developing products that U.S. consumers of music actually desired. The creators of iTunes appear to have figured out what U.S. music consumers actually want – easy access to and reasonable prices for downloads from vast libraries of online music.

The Harry Fox Agency, the licensing arm of NMPA, represents over 27,000 music publishers. It has invested enormous sums of money on IT improvements in the past few years to ensure that large-scale electronic licensing is a reality. Tremendous strides have been made in the last few years. The available catalogue is well in the hundreds of thousands of musical works. And it will continue to grow.

A Cautionary Note

There is a great economic incentive for industries to encourage Congress to endorse by legislation the technological "flavor of the month." Given section 115's prominent role in licensing music over the Internet and via other new technologies, copyright policy-makers should be particularly cognizant of the rapid technological change in this arena. Let me give a concrete example.

Under Section 104 of the DMCA, the Copyright Office was directed to write a report on the impact of recent copyright law amendments on electronic commerce and technological development. The Copyright Office transmitted this report in August of 2001, and one of its recommendations was to exempt from the reproduction right "temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work." The Office noted that it had been persuaded by webcasters that such copies had "no economic value."

There are both legal and technological problems with the Section 104 Report.

Legal Flaws. The Report predates our subscription services agreements with RIAA, Listen.com and others and, unlike those agreements, does not distinguish between on-demand and radio-style streaming. This is a critical distinction. To the extent that the Report recommends a statutory exemption from mechanical licensing for radio-style streaming, we respectfully submit that no exemption is needed. Publishers have never required, and have now expressly agreed not to require, mechanical licenses for such streaming. To the extent that the Report may be construed to seek a statutory exemption for on-demand streaming, however, such legislation would seriously impair the copyright in musical works and deprive songwriters and music publishers of a vital source of licensing income.

The Report correctly concludes that streaming involves the copying of musical works. The "aggregate effect" of streaming, it states, "is the copying of the entire [musical] work."[1][5]

The Report, however, then proceeds to consider whether so-called "buffer" copies made in the course of streaming are nevertheless a "fair use" of copyrighted music. Applying the factors codified in Section 107 of the Copyright Act, the Report concludes that, because two of the four factors (the transformative nature and economic value of the use) favor the user rather than the copyright owner, a "strong case" could be made that the making of a "buffer" copy in the course of streaming is a fair use not subject to the payment of royalties.[2][6] The law is crystal-clear, however – and the Report acknowledges – that the doctrine of fair use "is limited to copying by others which does not materially impair the marketability of the work which is copied."[3][7] In conducting the fair-use analysis, the law requires that consideration be given to whether, "if [the use] should become widespread, it would adversely affect the potential market for the copyrighted work."[4][8] Here, there can be no question that on-demand streams – which allow consumers to choose the songs they want, when they want to hear them – will displace record sales, and therefore directly affect "the marketability of the work that is being copied," or the "potential market for the copyrighted work," so as not to qualify as a fair use. Under these circumstances, it defies economic reality to say that "buffer" copies are fair use. Indeed, it would do violence to the fair use doctrine to do so.

1[5] Report at 132.

2[6] Report at xxiv.

3[7] Report at 138 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-67 (1985)).

4[8] Report at 139 (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984)).

The potential for the on-line delivery of music to displace record sales, in fact, was Congress's principal concern in enacting the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRA"). The legislative history of the DPRA states that the Act was intended to respond to the concern that "certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for the use of their work."[5][9] Or, in the words of then-Register of Copyrights Ralph Oman, "[W]ill what you call the 'celestial jukebox' replace Tower Records and the corner outlet stores and their glitzy stock of CD's, tapes, and records?"[6][10]

Chairman Sensenbrenner put it this way: "[N]ew interactive services are being created which allow consumers to use their TV's and computers to order any recording at any time. These subscriber services threaten sales of CD's, records and tapes."[7][11]

The Report did not consider on-demand streams in its analysis. It appeared to address only radio-style webcasting (for which, as noted, we do not seek mechanical licenses in our agreements with the RIAA and similar services). Given the direct and substantial impact that on-demand streaming will have on record sales, there is no basis for concluding that "buffer" copies made in the course of streaming a song on demand are a fair use of the underlying copyrighted work.

Finally, the fair use doctrine is ill-suited to the inquiry and analysis undertaken by the Report here. It is an equitable doctrine, to be applied in fact-specific circumstances.

5[9] S. Rep. No. 104-128 at 362 (1995).

6[10] *Performers' and Performance Rights in Sound Recordings*, 103d Cong. 4 (1993) (statement of Ralph Oman, Register of Copyrights, accompanied by Marybeth Peters, Policy Planning Adviser to the Register of Copyrights).

To apply it broadly, without the benefit of a fully developed factual record, as the Report does, is inconsistent with the terms of Section 107.

Technology. On the technological front, in June of 2002, NMPA engaged an expert in computer streaming technology (Dr. Andrew Cromarty) and delivered a report to the Copyright Office showing that, as of June 2002, "temporary" buffer copies incidental to digital transmissions of a sound recording were often ***not*** temporary, provided the consumer with many benefits of a permanent copy, and therefore ***did*** have economic value.

Dr. Cromarty explained that the "temporary" copy is not so temporary, rather, it is saved permanently on the hard-drive of a consumer's computer in a "cache". This is done to provide the user a functionality equivalent to ownership: immediate playback on demand of the previously streamed content, and continuous playback in case the internet connection is unstable. These variations on streaming technology will continue to be made-- especially because the competitive pressure from popular downloading services like iTunes will induce streaming services to offer download-like functionality. The point is simply that reliance on a term like "temporary buffer copy" in a dynamically changing technological context could create significant adverse, unintended consequences. This would especially be the case if such a malleable category were deemed exempt from copyright law: this would provide an incentive to use technology that barely met the definition while providing an economically significant benefit for which the consumer would be charged. In this situation, it would be unfair for the technology company to reap all of the benefit and for the artist to be uncompensated.

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[7][11] 141 Cong. Rec. H10,098-108 at 10,103 (1995) (statement of Rep. Sensenbrenner).

In short, NMPA respectfully suggests that Congress treat with great caution a legislative request from any industry based on the assumption that a particular technology of the moment is here to stay and that the law should be amended to accommodate it. As we have seen over and over again, rapid technological change is inevitable. A change in the law, however, is much less certain.

Conclusion

In summary, NMPA believes that section 115 is not in need of legislative change. While NMPA members continue to be battered by Internet piracy, we are enthusiastic about the new music download and subscription services and believe that they will ultimately prevail over unlawful copying. NMPA strongly supports these new business models through the licensing process both because it is in our economic interest and because it is the right thing to do. The basic policies set forth in section 115 remain wise and reasonable and do not require revision at this time.

Thank you for this opportunity to testify, and I look forward to answering your questions.